National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 15, 1998

TO: John D. Nelson, Regional Director, Region 19

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: J. R. Simplot Co., Case 36-CA-8144

530-4080-5012-6700

This Section 8(a)(5) case were submitted for advice on whether the Employer lawfully withdrew recognition based upon an employee petition showing that a majority of employees no longer wished to be represented by the Union.

ILWU was certified in a unit of drivers and mechanics in August 1994. On January 20, 1998, the Employer announced to the Union that it would withdraw recognition as of the expiration of the current bargaining agreement on March 31, 1998. The Employer based its withdrawal upon an employee petition, signed by 22 of the 39 unit employees, stating that the employees "do not want to be represented by" the Union. The Region has determined that the petition was lawfully circulated and clearly evidences that a majority of employees no longer wish union representation.

We conclude, in agreement with the Region, that the Employer acted lawfully in withdrawing recognition.

In Celanese Corp. of America, 95 NLRB 664 (1951), the Board held that upon the expiration of the certification year or a contract, an employer may withdraw recognition if either the union has in fact lost majority support, or the employer has a good-faith doubt of the union's majority support or the employer has a good-faith doubt of the union's majority status supported by objective considerations.[(1)]

In Chelsea Industries,[(2)] the General Counsel, in arguing to the Board that the employer was not privileged to withdraw recognition from the union, made an alternative argument that the Celanese "good faith" doubt standard should be overturned. The General Counsel argued that the Celanese rule encourages employers to engage in self-help measures which undermine the Supreme Court's view that, "even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief."[(3)] Thus, the General Counsel argued that a secret-ballot election should be the only means by which a Section 9(a) representative's presumption of majority status can be rebutted.

We conclude that it would not be appropriate in this case to issue complaint solely on the General Counsel's alternate theory in Chelsea Industries, particularly in view of the Board's recent pronouncement in Auciello. The Employer here had actual knowledge of the loss of majority status, and the Board currently permits an employer to withdraw recognition on this basis. Thus, there is no argument under current Board law supporting a violation. Furthermore, retroactive application of any new rule of law announced in Chelsea would be uncertain. Thus, under the law as it now stands, this case should be disposed of in accord with the long standing practice of General Counsels to dismiss charges alleging that an employer unlawfully withdrew recognition after the certification year or after expiration of a contract in circumstances where the union has in fact lost majority status among unit employees without any unlawful interference by the employer.[(4)]

Accordingly, the Region should dismiss this Section 8(a)(5), absent withdrawal.

B.J.K.

1.

[1] This principle was recently noted by the Board in Auciello Iron Works, 317 NLRB 364 (1995), on remand from 980 F.2d 804 (1st Cir. 1992).

2.

[2] Cases 7-CA-36846 et al.

3.

[3] Brooks v. NLRB, 348 U.S. 96, 104 n.18 (1954). See also Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 50 n.16 (1987) (allowing employers to rely on employees' rights in refusing to bargain is inimical to industrial peace) (dictum).

4.

[4] See, e.g., Ayers Corp., Case 21-CA-29761, Advice Memorandum dated July 18, 1994; J.P. Data Com, Cases 21-CA-26562 and 26579, Advice Memorandum dated April 3, 1989.